

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2019-001107

Trial Court Case No. 2017CP2700440

Thomas Ford, III,

Appellant,

v.

Town of Hardeeville,

Respondent,

RECORD ON APPEAL

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May 08 2020

SC Court of Appeals

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State of South Carolina)
County of Jasper)

In The Court of Common Pleas
Fourteenth Judicial Circuit
2017-CP-27-00440

Thomas Ford, III,)
Plaintiff,)
vs.)
The Town of Hardeeville,)
Defendant.)
_____)

Transcript of Record

December 17, 2018
Ridgeland, South Carolina

B E F O R E:

The Honorable Carmen T. Mullen, Judge

A P P E A R A N C E S:

Christopher James Geier, Esquire
Attorney for the Plaintiff

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Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

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No exhibits introduced.

1 THE COURT: The first one I have is *Thomas Ford vs.*
2 *The Town of Hardeeville*. I saw Mr. Geier.

3 MR. GEIER: Good morning, Your Honor.

4 THE COURT: Ms. Maines is here. Very good. Good
5 morning. Good morning.

6 Okay, it's my understanding that there was no video in
7 the DataMaster room. Is that correct?

8 MR. GEIER: Yes and no, Your Honor.

9 THE COURT: Okay.

10 MR. GEIER: There was a video from the DataMaster
11 room. The, the primary thrust of this, the -- there was
12 sort of a two-tiered issue with the DataMaster video.
13 Initially just prior to court, I made a motion to suppress
14 the video because the officer submitted an affidavit saying
15 that there was no video available, that it wasn't working,
16 and basically did nothing else other than sign that
17 affidavit. But then he videoed the DataMaster room with
18 his body cam attached to his hat.

19 THE COURT: Oh, so he left it -- okay, so he left that
20 on.

21 MR. GEIER: Well, on his hat.

22 THE COURT: Got it.

23 MR. GEIER: Right.

24 THE COURT: Is that typical? Do they leave it on when
25 they're in the DataMaster room or not?

1 MR. GEIER: No, not typically, Your Honor.

2 THE COURT: Okay.

3 MR. GEIER: It's just that once he realized that the
4 SLED video machine was not working, he ---

5 THE COURT: Got it.

6 MR. GEIER: So, my, my initial argument was if you're
7 going to submit an affidavit saying that there's -- it's
8 impossible to videotape the DataMaster room, then basically
9 you shouldn't be allowed to bring in that body cam because,
10 one, the body cam is not an authorized SLED video recording
11 device, which the SLED regs require. But, two, you know,
12 you can't on one hand say there's no video but on the other
13 hand play a video for the trier of fact.

14 THE COURT: Okay.

15 MR. GEIER: The judge in this case said no, he can go
16 ahead and play that video. Again, you know, the statute's
17 pretty clear that, you know, you've got to videotape these
18 things, but SLED says you can only use an authorized video
19 camera to do it.

20 You know, if we're going to let them just use body
21 cams and that's going to be a thing that's acceptable, then
22 that's going to start happening all over the place. That's
23 an easy way to sort of circumvent SLED's policies and
24 regulations.

25 And, you know, the problem also with the body cam,

1 which is what I address sort of in the second portion of
2 this, was if you're going to do that and the court's going
3 to allow it, then they need to videotape it in a way that
4 it's going to capture and record everything that you've got
5 to capture and record.

6 When it's on the brim of your hat and your head's
7 moving around and looking around and things like that, you
8 just necessarily can't do that. There were -- I think it
9 was twenty separate times where there was a significant
10 period of time where the defendant wasn't on camera. You
11 can't see the officer's actions during any of the
12 twenty-minute observation period other than writing down
13 various things and looking here and there.

14 This case is a little bit different than some of the
15 cases that are out there like *Elwell* and *Hercheck*, which
16 dealt with a refusal. And what the Court of Appeals and
17 the Supreme Court have said is that if there is a refusal,
18 then there's no reason to continue to record anything
19 because the data collection of evidence is over, and so
20 why make them go through this exercise of recording things
21 if ---

22 THE COURT: Right.

23 MR. GEIER: --- there's nothing to, you know, actually
24 be seen? This case is different for two reasons. One,
25 both of those cases dealt with the prior version of

1 56-5-29-53.

2 THE COURT: Okay.

3 MR. GEIER: And in that older version -- and there's a
4 copy attached as an exhibit, or if there's not, I can give
5 you a copy. There was a specific requirement that said if
6 there is a breath test, then the observation period must be
7 recorded.

8 THE COURT: Okay.

9 MR. GEIER: When the legislature went in and changed
10 the law in 2009, they omitted that portion. Now, they still
11 referenced the pretest twenty-minute observation period,
12 but that specific mandate that if there is a test you must
13 record has been removed.

14 In this case, looking at the DataMaster report and
15 also the testimony of the officer, and to the extent that
16 it was captured, there was a twenty-minute observation
17 period. This was a refusal based on the fact that he ran
18 out of time as the DataMaster was beeping at him. So,
19 you've typically got 90 seconds to ---

20 THE COURT: To blow.

21 MR. GEIER: --- to blow in there.

22 THE COURT: Got it.

23 MR. GEIER: And as the time expired, he had the, the
24 tube in his hand and time runs out, and the officer said
25 okay, you're done. You, you've refused. So, if there is

1 going to be -- if there actually was a twenty-minute
2 observation period, then you should have to record that in
3 a way that the statute contemplates.

4 And the last thing, the last issue that I raised here
5 had to do with the arresting officer was the third officer
6 on the scene. There was two officers already there, and we
7 had video from one of those two officers.

8 THE COURT: Their body cam?

9 MR. GEIER: Body cam.

10 THE COURT: Okay.

11 MR. GEIER: I forget, Your Honor, now -- it's been so
12 long -- if it was body cam.

13 THE COURT: Or patrol car.

14 MR. GEIER: Or dash cam. No, I think it might have
15 been dash cam.

16 THE COURT: Okay. Okay.

17 MR. GEIER: But the audio recording was picked up on
18 her, you know, walkie-talkie that she's got.

19 THE COURT: Okay.

20 MR. GEIER: And at one point we can hear the third
21 officer, Sergeant Brown, do what is a nonstandardized field
22 sobriety test, which is specifically spoken about and
23 listed in the NHTSA manual, which is the DUI detection
24 manual, and it's without looking at your watch, what time
25 do you think it is right now. And that, again, that, along

1 with the finger count, the ABC test, things like that are
2 field sobriety tests, although they are listed as
3 nonstandardized and not anywhere near as reliable as the
4 three standardized field sobriety tests.

5 THE COURT: Okay.

6 MR. GEIER: None of that was videotaped; it was
7 audiotaped. Again, the statute ---

8 THE COURT: He testified to that or she testified to
9 that at trial. Is that correct?

10 MR. GEIER: I'm sorry. Say that again.

11 THE COURT: Did the officer testify to any of that at
12 trial or no?

13 MR. GEIER: That was heard. That portion of the, the
14 audio was played.

15 THE COURT: Oh, that audio, okay.

16 MR. GEIER: Right.

17 THE COURT: Okay.

18 MR. GEIER: And all we have is a video of, you know,
19 the back of some car but not his car.

20 THE COURT: Got it.

21 MR. GEIER: And he's not, he's not in the vehicle.
22 He's not anywhere to be seen. The officer walked away, who
23 was recording, and so we can't hear if there was anything
24 else that was discussed.

25 THE COURT: Okay.

1 MR. GEIER: But, you know, 56-5-29-53 requires the
2 videotaping of all field sobriety tests. It doesn't
3 specify standardized field sobriety tests, and the reason
4 why it's important is, you know, you have to videotape the
5 things that are important. And that's what the Court of
6 Appeals and Supreme Court have said, that it's -- you know,
7 just because you've moved the video while the defendant's
8 standing there, that's not a basis to dismiss because
9 that's not an important portion of your, your case. But it
10 was an important enough portion of the case that they
11 played it in trial.

12 And I would also go back to the other portion, too,
13 with the data collection of the DataMaster room. They
14 played all that over our objection. So, again, in all
15 these cases we have a clear violation of the statute. The
16 remedy is dismissal. I did move for suppression both prior
17 to trial and prior to the playing of those videos.

18 THE COURT: Okay.

19 MR. GEIER: Which were denied by the court.

20 THE COURT: Okay.

21 Yes, ma'am.

22 MS. MAINES: Thank you, Your Honor. I'd like to just
23 clarify a few things from the return in this case. So, the
24 return actually states there were motions to dismiss that
25 were filed. And then if you look at paragraph 10 of the

1 return, Your Honor, the, the actual return states that the
2 testimony given was that the machine was ready, but Mr.
3 Ford did not provide a sample. The machine then timed out
4 and was processed as a refusal.

5 So, in this case the basis of giving a dismissal
6 because there was not some sort of twenty-minute
7 observation would be the suppression of evidence that would
8 be presented. In this case, there was no breath test to
9 present; he never gave a sample. So, even if that evidence
10 should have been suppressed, it's not relevant to the
11 finding or the, the final finding of beyond a reasonable
12 doubt in this case. The testimony that was given, the
13 same, the same analysis should apply to the one question
14 that an officer asked: do you know what time it is without
15 looking at your watch. It can clearly be heard on the
16 video.

17 But even with that being said, if Your Honor would
18 find that that evidence was improper, there is also
19 additional testimony given. If you look at paragraph 7 of
20 the return, that there were standardized sobriety tests
21 conducted. There was a horizontal gaze and nystagmus test,
22 a walk and turn test, a one-legged test. Each of these
23 tests were videotaped, they were presented, and he did not
24 pass on any of them.

25 The walk and turn test -- I'm sorry, Your Honor, the

1 one-legged test was stopped for his safety, but in that --
2 and he also gave testimony that prior to the three seconds
3 ending, due to his level of impairment, it was observed
4 three of the four clues of that test.

5 So, regardless of whether or not -- I mean, that the
6 issue before the appeal is whether you -- whether those
7 motions to dismiss were errors on behalf of the court.
8 However, there is case law that says -- there was, again,
9 there was no breath test to be presented, thus negating the
10 necessity for that twenty-minute recording.

11 And additionally, as far as the asking the question of
12 what time is it without looking at your watch, it was
13 recorded. The video, the audio of it was recorded, and I
14 don't think that's any different than when an officer stops
15 a -- stops a defendant and says where were you going
16 tonight or how much have you had to drink. They were just
17 simply questions that are not relevant to the finding of
18 whether or not this defendant was guilty of the DUI. So,
19 we would respectfully ask for you to uphold the finding of
20 the lower court.

21 THE COURT: Okay.

22 Any response, Mr. Geier?

23 MR. GEIER: Yes, Your Honor. *State vs. Ewell* talks
24 about this type of thing and specifically towards the
25 DataMaster test. I've got a copy here if Your Honor

1 would...

2 (A PAUSE.)

3 MR. GEIER: If you look at the second page, I've got a
4 highlighted portion there.

5 THE COURT: Okay.

6 MR. GEIER: And it's regardless. Whenever there is a
7 case where there has been some portion of the DataMaster
8 administered, it needs to be videotaped in, in all cases.
9 I've got a second case.

10 THE COURT: But if the videotape isn't working,
11 they're allowed to file the affidavit.

12 MR. GEIER: What?

13 THE COURT: I said if the videotape isn't working,
14 they're allowed to file an affidavit.

15 MR. GEIER: That, that, that's correct. That's
16 correct, and if you're going to file the affidavit -- and
17 that was the second portion of my initial motion was if
18 you're going to accept the affidavit in lieu of the video,
19 then it goes to *City of Greer vs. Humble*, which says that
20 you have to say on your affidavit which reasonable efforts
21 you took to maintain the video recording equipment in
22 workable order. And so, one, despite the affidavit, that
23 was not something that the arresting officer submitted into
24 evidence. The only reason it was before the court at all
25 is that in our pretrial motion, I introduced it through the

1 officer.

2 THE COURT: Okay.

3 MR. GEIER: And then, you know, again we argued later
4 on in reference during the cross-examination of the officer
5 if, if you're going to submit that affidavit, that's fine
6 but you, one, shouldn't be able to play that video then.
7 Two, if you're going to have the affidavit, you have to
8 comply with *Greer, City of Greer vs. Humble*, which says
9 which affidavit -- or which reasonable efforts did you make
10 to maintain the video recording, and that was left blank.

11 THE COURT: Okay. All right. Well, I'm going to take
12 this under advisement, and I'll let y'all know something
13 pretty quick, okay?

14 MR. GEIER: Thank you, Your Honor.

15 THE COURT: Thank you. I appreciate it.

16 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR JASPER COUNTY, SOUTH CAROLINA, ON THE 17TH DAY OF DECEMBER, 2018.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/Elizabeth B. Harris, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

SEPTEMBER 10TH, 2019

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF JASPER

) THE FOURTEENTH JUDICIAL CIRCUIT

) CASE NO. 2017-CP-27-_____

THOMAS FORD III,

)

)

Appellant,

)

)

vs.

)

NOTICE OF APPEAL

)

TOWN OF HARDEEVILLE,

)

)

Respondent,

)

)

)

The Defendant Thomas Ford III appeals his conviction and sentence in this case. The sentence was imposed by the Honorable Nancy Gutierrez on October 30, 2017. On said date, the Defendant was found guilty of Driving Under the Influence, Ticket No. 20161170000854, at a bench trial.

The grounds for the appeal are as follows:

1. The videos from the scene and breath test site do not conform with the mandatory provisions of S.C. Code Ann. § 56-5-2953;

2. The Affidavit for Failure to Produce a Breath Site Video Recording, signed and produced by the arresting officer is insufficient and does not meet the requirements of S.C. Code Ann. § 56-5-2953.

Respectfully Submitted,

s/Christopher J. Geier
SC Bar No. 75776
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Beaufort, South Carolina
October 30, 2015



1

Nancy Gutierrez
Senior Judge/ Senior Clerk of Court

Atiya Johnson
Associate Judge / Clerk of Court

March 1, 2018

Jasper County Clerk of Court
14th Judicial Circuit
P.O. Box 248
Ridgeland, SC 29936

Reference: GS Case#: 2017-CP-27-00440
State of South Carolina vs. Thomas Jeffers Ford, III

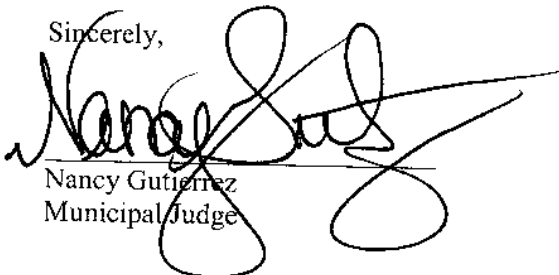
Defendant Thomas Jeffers Ford, III was found guilty of Driving under influence 1st offense on October 30, 2017 based upon the following facts:

1. That attorney Geier presented 2 motions to dismiss based on the fact that Officer DeWeese submitted the Affidavit for Failure to Produce a Breath Site Video Recording checking the first box and explaining that the video cameras in the DataMaster room were inoperable and the 20-minute observation period was recorded on his body camera. That a question was asked by another officer of "do you know what time it is?" That it could be heard but not seen in the video. Both motions were denied based on section code 56-05-2953(B) as said officer did comply accordingly.
2. That officer DeWeese testified that on June 11, 2016, dispatch notified a reckless driver in a dark in color Dodge truck with a motorcycle in the rear on I-95 South near mm18 swerving all over the roadway. That dispatch later notified this officer of a collision that occurred on I-95 South mm5 in reference to the same vehicle.
3. That officer DeWeese arrived after Ptl. Watson on scene and observed tire marks in the grassy median followed by skid marks in the pavement and then back in the median were the truck collided with the guard wire. During the course of events, said vehicle struck an 18-wheeler.
4. That officer DeWeese observed the driver standing next to the driver side door of the vehicle identified as Thomas Jeffers Ford, III.
5. That officer DeWeese testified that the defendant appeared to be unsteady on his feet, observed an open container in plain view along with several unopened bottles of beer in the vehicle. This officer began to speak with him to investigate the collision which it was observed blood shot, glossy eyes and a heavy order of alcohol coming from his person and the vehicle.

6. That officer DeWeese began to interview defendant Ford by asking several questions such as What happened? Where was he coming from? Where was he going? Defendant Ford responded he did not know what happened and that he was coming from Daytona Beach, FL headed to Edisto Beach, FL etc.
7. That the officer testified that he is qualified to conduct the Standardize Field Sobriety Test due to receiving his certification in 2003 in the state of Arizona and later in 2013 at the SC Criminal Justice Academy, renewed every 3 years and is current. That he conducted the Standardize Field Sobriety test on Mr. Ford, the Horizontal Gaze Nystagmus observed a lack of smooth pursuit on both left and right eyes, distinct and sustain nystagmus at maximum deviation on both left and right eyes and above 45 degrees on both eyes. All check vertical nystagmus observed 6 of 6 clues of that test. The Walk and Turn test were he was unable to maintain balance in the instructional period, raised arms for balance, missed heel to toe first step on step #9, step off line, multiple steps on the first step of 9 steps 1,2,4,5,6,7,8 on the return trip 1,2,4 and 6 incorrect number of steps, 12 steps when told to stop took 7 steps before stopping. Conducted improper turn, observed 6 out of 8 clues for this test. One legged test was conducted, Mr. Ford raised his arms for balance waved his arm side to side, placed foot down and stumbled backwards near falling to the on coming traffic. Test was stopped for his safety. Prior to the 3 seconds ending due to his level of impairment it was observed 3 out of 4 clues of that test.
8. Based on the observation of the collision, the interview with Mr. Ford and the performance of the field sobriety test, the officer believed that Thomas Jeffers Ford, III was under the influence of alcohol and was unable to operate his vehicle safely.
9. That defendant Ford was placed under arrest for DUI, Minor in Possession of Alcohol and was advised of his Miranda Rights which was captured all on video.
10. That defendant Ford was transported to the jail and in the DataMaster room the officer discovered that both cameras were inoperable and activated his body camera to record the 20-minute observation period and his actions. His implied consent rights were advised. Mr. Ford did not contest. Mr. Ford debated to take the test and the 20-minutes observation period was continued. The machine was ready, and Mr. Ford did not provide a sample, the machine timed out and was processed as a refusal.

Based on the testimony that was given, the videos presented, the motions presented by the defense attorney and according to Section 56-5-2953, I find there was proof beyond a reasonable doubt that Thomas Jeffers Ford, III was Driving under the influence. Therefore, I respectfully ask that this verdict be upheld.

Sincerely,



Nancy Gutierrez
Municipal Judge

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) THE FOURTEENTH JUDICIAL CIRCUIT
) CASE NO. 2017-CP-27-00440

COUNTY OF JASPER

THOMAS FORD III,

Appellant,

vs.

APPELLANT'S RESPONSE TO THE
TRIAL COURT'S RETURN

TOWN OF HARDEEVILLE,

Respondent,

The Appellant Thomas Ford III offers the following Response to the Return on Appeal submitted by the Honorable Nancy Gutierrez:

2018 APR 14 AM 10:57
JASPER

INTRODUCTION

This appeal stems from a conviction imposed by the Honorable Nancy Gutierrez of the Hardeeville Municipal Court on October 30, 2017. On said date, the Appellant was found guilty of Driving Under the Influence, Ticket No. 20161170000854, at a bench trial. Notice of appeal was filed on October 30, 2017 and served upon the Municipal Court and Judge on November 1, 2017. The grounds for the appeal are that 1. The videos from both the scene and Datamaster room do not conform with the mandatory provisions of S.C. Code Ann. § 56-5-2953 and 2. The arresting officer's affidavit regarding the Datamaster video was insufficient.

The Return, which has not been filed as of the date of this Response but has been obtained by Appellant's Counsel on April 18, 2018, fails to address one of Appellant's issues regarding the video from the Datamaster room. Additionally, the audio recording of the trial, obtained by Appellant on April 16, 2018, does not include the pre-trial motions which occurred immediately before the bench trial began and which the Appellant renewed at during his directed verdict motions.

STATEMENT OF FACT

1. Appellant was arrested for Driving Under the Influence and Minor in Possession of Alcohol on June 11, 2016 in the Hardeeville city limits by Officer Deweese, then of the Hardeeville Police Department.

2. The bench trial was held on October 30, 2017, with Officer Deweese serving as the prosecutor for the State and as the State's sole witness. Appellant plead guilty to the minor in possession charge.

3. Several videos were produced by the State in response to Appellant's Rule 5 and Brady Motion on a single DVD: A. Officer Deweese's vehicle video from scene (Titled IN-CAR FRONT); B. Officer Watson's vehicle video from the scene (Titled Watson's IN-CAR); C. Officer Deweese's body camera video from the scene (Titled Axon On-Scene); and D. Officer Deweese's body camera videos from the Datamaster room (Titled Axon Datamaster P1 and P2). The DVD also included a PDF file titled Datamaster Paperwork, which included an Affidavit for Failure to Produce a Breath Site Video Recording, an Advisement of Implied Consent Rights, a Breath Alcohol Analysis Test Report, and a Notice of Suspension. (Appellant's Exhibit A).

4. No video from SGT Brown of the Hardeeville Police Department, who was present at the scene, was produced.

5. Other than the body camera videos, which are not SLED approved as required by SLED regulation 8.12.7, no video from the Datamaster room was produced.

6. The field video from Officer Watson's vehicle was not introduced as evidence by the State. (Exhibit A, Watson's IN-CAR). However, Appellate played the video for the trial court and introduced it into evidence during trial. (Appellant's Exhibit B, Trial Recording CD-R). That video shows that Officer Watson and SGT Brown, both of the Hardeeville Police Department, arrived on the scene. Shortly after arrival, we hear SGT Brown interviewing the Appellant. SGT

Brown asks how much Appellant had to drink that evening and then he administers a non-standardized Field Sobriety test by asking Appellant if he knows what time it is without looking at his watch. (Appellant's Exhibit A, Watson Field Video at the 5 minute 20 second mark). These questions are asked and answered off camera. Officer Watson then leaves the general area and we cannot hear if other field sobriety tests are administered by SGT Brown.

7. The State produced body camera videos from the Datamaster room (Exhibit A, Axon Datamaster P1 and P2), and an affidavit stating that the Datamaster room video equipment was in-operational. (Appellant's Exhibit C, Affidavit for Failure to Produce a Breath Site Video Recording). This affidavit did not include which efforts were taken to maintain the camera in an operable condition. Regardless, this affidavit was not offered or submitted into evidence by the State, though the Appellant questioned the arresting officer about the affidavit on cross examination.

8. The body camera videos from the Datamaster room which were played at trial, over appellant's objection (Exhibit B at the 08:33 minute mark), were from a camera attached to the brim of the Officer Dewese's cap. (Appellant's Exhibit A, Axon Datamaster P1 and P2). As such, the video did not capture any actions of Officer Dewese during the administration of the breath test, other than those of his hands. It also fails to show the Appellant during this encounter over 20 separate times for a total of over four minutes. (Appellant's Exhibit A, Axon Datamaster P1 at the following minute marks: 14:56 to 14:58; 15:00 to 15:01; 15:08 to 15:10; 15:24 to 15:31; 15:35; 19:54 to 20:06; 20:14 to 20:28; 20:29 to 20:48; 21:04 to 21:46; 21:52 to 21:54; 21:57 to 22:29; 22:48 to 23:17; 23:45 to 23:48; 23:51 to 23:55; 24:00 to 24:01; 24:04 to 24:18; 28:38 to 28:40; 28:48 to 28:54; 29:05 to 29:17; 29:22 to 30:13; and Axon Datamaster P2 at the following minute marks: 00:10 to 00:20; 00:29 to 00:41; 00:48 to 10:00).

9. The video does show that, during the time Appellant had to provide a sample, he asked numerous follow up questions regarding the test. As Appellant puts the mouth piece up to his mouth and prepares to blow. However, time runs out and Officer Dewese marks it as a refusal. (Appellant's Exhibit A, Axon Datamaster P2 at the 01:46 minute mark to 03:47).

10. Prior to the beginning of trial, Appellant: A. renewed his Rule 5 and Brady motion; and B. moved to suppress the non-SLED approved body camera videos from the Datamaster room as the State also produced an affidavit stating that that a breath test video could not be produced, which was denied. This portion of the case was not recorded by the trial court, and these issues were not addressed in the trial court's return. (Exhibit B).

11. At the close of the State's case, Appellant attempted to renew his pretrial motion to suppress and/or dismiss the Datamaster video on the grounds that because an affidavit was submitted stating that it was impossible to video tape the Datamaster test, the State should be bound by the affidavit and be prevented from offering the non-approved Datamaster video into evidence. However, the trial judge stated that she had already denied that motion and instructed Appellant to move on. Appellant then moved for directed verdict for failure to produce a compliant Datamaster video on the basis that since there was an observation period in this case, the officer's failure to produce a video which complied with the requirement of 56-5-2953. Finally, Appellant renewed his pretrial motion to dismiss for failure to produce a field video which showed SGT Brown's conduct during a non-standardized field sobriety test. The trial court denied all three of these motions. (Exhibit B, Trial Recording at the 1:21:25 minute mark to the 1:30:46 minute mark).

ARGUMENT

I. The Trial Court erred in failing to suppress the Datamaster video submitted by the State and failing to subsequently dismiss this case.

The affidavit produced by the State is a form affidavit. (Exhibit C). It has two main sections; the first states: "I hereby certify that I cannot produce a video recording from the breath test site because:" and the second section states: "I hereby certify I cannot produce of video recording of the person's conduct during the 20-minute pre-test waiting period because it was physically impossible due to the circumstances outlined below."

The first section has three boxes from which the officer must choose. The first, which the officer in this case checked, states, in pertinent part:

At the time of the person's arrest or probable cause determination, the video recording equipment or breath test device at the breath test site was in an inoperable condition and reasonable efforts have been made to maintain the equipment in an operable condition; and, there was no other operable breath test facility available in the county....

The second box, which was unchecked by the officer, states: "The person needed emergency medical treatment."

The third box, which was also unchecked by the officer, states: "Exigent circumstances existed or valid reasons based on the totality of the circumstances existed and are outlined below." While this final box was unchecked, the office wrote the following: "The video equipment in the Datamaster room was inoperable and not receiving power. The observation period was video recorded on my department body camera."

At the motion hearing held immediately prior to trial, the Appellant argued that by checking the first box of section one, the officer certified that no video recording could be produced. As the officer did not check the third box regarding exigent circumstances, any explanation provided in

that section was void. Further, since an affidavit was produced which certified that he could not produce a video, the officer should be prevented from then producing, on the other hand, a video of that very event – particularly one that does not satisfy SLED Regulation 8.12.7 which states that “[t]he only approved video recording system is the IRSA Video Recording System, IRSA Video and the W.H. Platts Company.” 8.12.7(A) (1). (Exhibit D, SLED Regulation 8.12.7).

If the video was suppressed, however, the Appellant also argued that, per *City of Greer v. Humble*, 402 S.C. 609, 742 S.E.2d 15 (S.C. App., 2013), that an affidavit which merely states that reasonable efforts were made to maintain the equipment without stating “which reasonable efforts” were made is deficient and does not comply with the requirements of S.C. Code Ann. § 56-5-2953. So, as the affidavit failed to meet the statutory requirements, the case should be dismissed.

II. The Trial Court erred in failing to dismiss this charge for failure to produce a Datamaster video which complies with S.C. Code Ann. § 56-5-2953.

This issue was omitted by the trial court in its return, but it was fully argued by Appellant. (Exhibit B, Trial Recording at the 1:21:25 minute mark to the 1:30:46 minute mark.) S.C. Code Ann. § 56-5-2953 states, in pertinent part:

Incident site and breath test site video recording.

(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.

- (2) The video recording at the breath test site must:
- (a) include the entire breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test;
 - (b) include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test; and
 - (c) also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video record this waiting period.

In this case, the non-approved body camera footage from the Datamaster room does not show the entire breath test procedure, the actions of the breath test operator (other than that of his hands) or much of Appellant's conduct during the 20 minute observation period as the video was taken by a body camera which was attached to the brim of Officer Deweese's cap.

Regarding the video from the 20 observation period, our Supreme Court previously stated that if a person refuses to take the breath test, failure to video tape the subject's conduct for 20 minutes does not warrant dismissal, so long as the other requirements of the video tape statute are satisfied. *State v. Elwell*, 403 S.C. 606, 743 S.E.2d 802, 805 (S.C. 2013).

However, it should be noted that *Elwell* dealt with the previous version of § 56-5-2953. In that version, subsection (A)(2)(d) included the following language: "However, if the arresting officer administers the breath test, the person's conduct during the twenty-minute pre-test waiting period must be videotaped." That language was omitted by the legislature in the current version of 56-5-2953 and it is questionable as to whether the holding in *Elwell* would apply to the current version of the video tape statute.

Even if *Elwell* does apply to the current statute, the facts in that case are distinguishable from the current case. *Elwell* dealt with a clear refusal and an officer's decision stop recording after the refusal. The Supreme Court stated:

Once an arrestee refuses the breath test, the evidence gathering portion is over. As a consequence, we agree with the State that **once Elwell refused the test and no breath test was administered**, the statute did not require the arresting officer to continue to videotape the twenty-minute pre-test waiting period, and therefore, the videotape produced at trial complied with the statutory requirements. **To require otherwise would result in the officer having to undergo a useless and absurd act.**

Elwell, 743 S.E.2d at 806. (Emphasis added)

In this present case, there was not an actual refusal. Mr. Ford took too long to make the decision to blow and time ran out. Unlike *Elwell*, because there was not an actual refusal until time ran out to submit a sample, the evidence gathering portion was still ongoing. Further, unlike *Elwell*, in this case there was a 20 minute observation period and that fact was noted on the Datamaster report. (Exhibit E, Breath Alcohol Analysis Test Report). Because the evidence gathering portion was ongoing, and there was a 20 minute observation period, it must be videotaped in a manner which complies with the statute.

It should also be noted that the officer chose to play the entirety of the tape at trial. If the officer did not believe that the 20 minute observation period was necessary or that it was a useless and absurd act, he could have simply shown Mr. Ford being informed he was being video recorded, that he could refuse the test and then fast forward to the point of the video when time to submit a sample ran out. He did not do that. Instead he played the entire video for the trial judge because he believed that the observation period was evidence that supported the DUI charge. The holding in *Elwell* does not apply to this case, but its reasoning is instructive.

In this case, the body camera video, which does not meet SLED requirements, does not adequately show the conduct of the subject during the 20 minute observation period. While our appellate courts have held that dismissal under 2953 is not required when the camera briefly omits then the subject (See *State v. Taylor* 411 S.C. 294, 768 S.E.2d 71, 77 (2014)), in this case as the camera failed to capture Mr. Ford over 20 times during the observation period, totaling over 4 minutes.

Even if this Court were to find that the 20 minute observation period was not required, the video is still not SLED approved and it also fails to show: 1. The entire breath test procedure as the camera moves around depending on the direction Officer Deweese's head is pointed; and

2. The actions of the breath test operator while performing the test, other than the actions of his hand. Both of these requirements exist in the statute, independent of a twenty minute observation period.

While neither the legislature nor our appellate courts have defined “the entire breath test procedure” or explained what constitutes “the test,” SLED Regulation 8.12.5 (C) lists the breath test sequence as: 1. Video recording; 2. Advisement process; 3. Mouth check; 4. Data entry; 5. Observation period; 6. Operational protocol; and 7. Print out of the test report. It goes on to state: “To ensure a proper test is administered, a test is considered complete only after the operation protocol has finished and the signature lines are printed on the Breath Alcohol Analysis Test Report/Evidence Ticket.” (Exhibit F, SLED Regulation 8.12.5).

These actions were not properly videoed and the trial court erred in failing to dismiss this case.

III. The Trial Court erred in failing to dismiss this charge for failure to produced a field video which complies with S.C. Code Ann. § 56-5-2953.

In this case, a recognized field sobriety test, albeit a non-standardized one, was performed off camera.

SECTION 56-5-2953. Incident site and breath test site video recording.

(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.

(1)(a) The video recording at the incident site must:

(ii) include any field sobriety tests administered;

(B)...In circumstances including, but not limited to, road blocks, **traffic accident investigations**, and citizens' arrests, **where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section.**

There are 3 Standardized Field Sobriety Tests recognized by the National Highway Traffic Safety Administration. They are widely known to be the Horizontal Gaze Nystagmus test, the Walk and Turn and the One Legged Stand. However, there are a number of other field sobriety tests recognized by NHTSA. These tests include asking for two things simultaneously, asking for the driver's middle name, the alphabet test, the backwards countdown test and the finger count test.

In this case we can hear SGT Brown administering one non-Standardized Field Sobriety Test by asking Mr. Ford if he knows the time without looking at his watch. (Exhibit A, Watson's IN-CAR). This, along with the countdown test, are commonly used during DUI investigations. When this question is asked, we cannot see either Mr. Ford or his vehicle. As Officer Watson moves out of the area, and as the arresting officer did not produce any video from Officer Brown or his vehicle, we cannot hear whether or not SGT Brown conducted any subsequent Field Sobriety Tests.

The statute requires video tape of any field sobriety tests administered. It does not state that only Standardized Field Sobriety must be videoed. Again, non-standardized tests like this are common and, in most cases, the officer moves the Defendant into the view of the camera before giving these tests or does so while parked behind the subject with his or her camera activated.

While an exception exists for accident cases "where an arrest has been made and the video recording equipment has not be activated by blue lights..." the video recordings submitted in this case were activated by blue lights so that exception does not apply. Even if this court were to rule that it does apply, the statute requires a compliant video as soon as practicable. As there was video from that time and location, we know that it was practicable to video this exchange – it was just not

done. The field videos produced do not meet the requirements of 56-5-2953 and the trial court erred by failing to dismiss this case.


REMEDY

The trial court erred in failing to suppress the Datamaster video in lieu of the Arresting Officer's affidavit. However, had the court required the officer to rely on his affidavit, said affidavit was insufficient pursuant to 56-5-2953 and, as such, the case should have been dismissed on those grounds.

The trial court also erred in failing to dismiss the case for failing to produce both field videos and Datamaster video which complied with 56-5-2953.

The remedy for non-compliance with the video tape statute is dismissal. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 341, 713 S.E.2d 278, 282 (2011).

Respectfully Submitted,



SC Bar No. 15716

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Attorney for the Appellant

Beaufort, South Carolina
April 24, 2018



SOUTH CAROLINA LAW ENFORCEMENT DIVISION
AFFIDAVIT FOR FAILURE TO PRODUCE A
BREATH SITE VIDEO RECORDING



I. I hereby certify that I cannot produce a video recording from the breath test site because:

- At the time of the person's arrest or probable cause determination, the video recording equipment or breath test device at the breath test site was in an inoperable condition and reasonable efforts have been made to maintain the equipment in an operable condition; and, there was no other operable breath test facility available in the county. Operable breath test facility means a site with both an operable breath test device and operable video recording equipment.
- The person needed emergency medical treatment.
- Exigent circumstances existed or other valid reasons based on the totality of the circumstances existed and are outlined below.

The video equipment in the Datamaster Room was inoperable and not receiving power. The observation period was video recorded on my department body camera.

NOTE: Only complete this section if you are able to video record the test but are unable to video record the 20-minute waiting period.

II. I hereby certify that I cannot produce a video recording of the person's conduct during the 20-minute pre-test waiting period because it was physically impossible due to the circumstances outlined below:

Thomas Jeffers Ford III
Subject's Name

Hardeeville PD
Arresting Agency

2016170000854/16-003
Ticket/Case Number

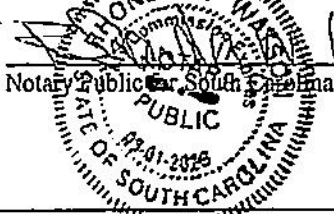
B. Dewese
Arresting Officer's Name (Print)

[Signature]
Arresting Officer's Signature

6-11-16
Date of Signature

STATE OF SOUTH CAROLINA)
County of BEAUFORT

Sworn to and subscribed to me this 11 day of JUNE, 2016



[Signature] RHONDA M. WATSON
Notary Name (Print)

03/01/2020
My commission expires

**SOUTH CAROLINA LAW ENFORCEMENT DIVISION
FORENSIC SERVICES LABORATORY**

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8.12.7 BREATH SITE VIDEO RECORDING

GENERAL PURPOSE: To set forth policies for breath site video recording.

POLICY: The Division will approve and certify video recording systems for breath sites.

SPECIFIC PROCEDURES:

A. SYSTEM APPROVAL/CERTIFICATION

1. SLED will approve such methods for performing video recordings, at breath testing sites, that are demonstrated to the satisfaction of SLED to produce quality and reliable reproductions. The only approved video recording system is the IRSA Video Recording System, IRSA Video and The W. H. Platts Company. This system was previously known as The W.H. Platts Company's VDS-2...
2. A SLED certified video recording specialist will certify each IRSA Video Recording System. For a video recording system whose testing station is a mobile van, once the video recording system is certified for use in the van, it remains certified regardless of the physical location of the van.
3. A certification record documenting the serial number, site location, date/time, and name of SLED certified video recording specialist will be completed and maintained by SLED. A record will be issued for each new site except when the system is moved to SLED or manufacturer's service representative for inspection, repair, maintenance, or storage and later moved back to its original site. Certification records do not require the signature of the SLED video recording specialist, since the name is listed on the report. These records are maintained electronically by SLED for a minimum of five years.
4. A new certification is not required if a system component(s) is replaced, but is required if the entire system is replaced. A certification does not expire unless revoked by SLED.

B. SYSTEM INSPECTIONS

1. SLED certified video recording specialists and/or manufacturer's service representatives may inspect, repair, or maintain video recording systems. SLED will begin an on-site inspection on every certified VDS-2 at least once every twelve months and a report will be issued upon completion. The inspection may begin before twelve months has elapsed and not be completed until after the twelve-month period. Therefore, the time lapse between inspection reports may exceed twelve months.
2. After an inspection, an inspection record, with serial number, site location, date/time of completion, and name of SLED certified video recording specialist will be completed documenting the system is



SOUTH CAROLINA LAW ENFORCEMENT DIVISION
BREATH ALCOHOL ANALYSIS TEST REPORT
DRIVING UNDER THE INFLUENCE



SUBJECT BIOGRAPHICAL INFORMATION

SUBJECT NAME: THOMAS J FORD
RACE: WHITE
SEX: M
DOB: [REDACTED]

DL NUMBER: [REDACTED]
DRIVER'S LICENSE: SC
SUBJECT ADDRESS: [REDACTED]

ARREST INFORMATION

OFFICER NAME: B DEWEESE
TICKET NUMBER: 20161170000854
ARREST DATE: 06/11/2016

AGENCY ORI: SC0270100
COUNTY OF ARREST: 27 - JASPER
ARREST TIME: 03:00

OPERATOR INFORMATION

TEST OPERATOR: B DEWEESE
CERTIFICATION #: DMT008814
SOLUTION LOT #: 15803
BREATH TEST VIDEO RECORDED? NO
SUBJECT'S MOUTH CHECKED AND
ANY FOREIGN MATERIAL REMOVED? YES
SUBJECT ADVISED OF APPLICABLE RIGHTS? YES

AGENCY ORI: SC0270100
EXPIRATION DATE: 12/02/2017
BOTTLE: 0250
SUBJECT INFORMED OF VIDEO RECORDING? N/A
SUBJECT INFORMED OF TYPE SAMPLE REQUESTED? YES
SUBJECT OBSERVED FOR A MINIMUM OF (20)
TWENTY MINUTES? YES

SUBJECT'S BREATH ALCOHOL TEST RESULTS

DATAMASTER DMT SERIAL # 102007

TEST DATE		06/11/2016
OBSERVATION START TIME:		03:35:41
BLANK TEST	0.00	03:58:40
INTERNAL STANDARD	VERIFIED	03:58:47
0.08% SIMULATOR TEMPERATURE	34.01°C	03:59:04
0.08% SIMULATOR VERIFICATION	0.078	03:59:04
BLANK TEST	0.00	03:59:56
SUBJECT SAMPLE	0.00	04:01:59
BLANK TEST	0.00	04:02:51
INTERNAL STANDARD	VERIFIED	04:02:58

Refused

Subject's Signature

6-11-16 / 0404

(Received Copy) Date/Time

Arresting Officer's Signature

Test Operator's Signature

VISIT WWW.SLED.SC.GOV AND CLICK ON IMPLIED CONSENT THEN CLICK ON BREATH SITE VIDEO RECORDINGS. ENTER THE REQUESTED INFORMATION FROM THE BOX BELOW TO ACCESS THE VIDEO RECORDING OF THIS BREATH TEST:

There is no video recording of this breath test.

IMPORTANT NOTICE

INFORMATION FROM THIS REPORT WILL BE USED TO ACCESS THE BREATH TEST VIDEO ANYONE WITH THIS INFORMATION WILL HAVE ACCESS TO THE VIDEO PROTECT THIS REPORT AS YOU WOULD ANY IMPORTANT DOCUMENT. SLED ASSUMES NO RESPONSIBILITY FOR UNAUTHORIZED ACCESS.

**SOUTH CAROLINA LAW ENFORCEMENT DIVISION
FORENSIC SERVICES LABORATORY**

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8.12.5 ADMINISTRATION OF BREATH ALCOHOL TEST

GENERAL PURPOSE: To set forth policies for the administration of implied consent breath alcohol tests.

POLICY: The Division will establish procedures for properly conducting implied consent and non-implied consent DataMaster DMT breath alcohol tests.

SPECIFIC PROCEDURES:

A. IMPLIED CONSENT TESTS

1. Any arresting and/or primary investigating officer may direct that a subject under arrest or detained for an implied consent related offense submit to a breath alcohol test.
2. Except for Flying Under the Influence (FUI), any officer (if a certified operator), including the arresting and/or primary investigating officer, may administer the breath test if the observation period is video recorded.
3. SLED approved methods do not require the breath test be administered within any particular time after the arrest. The test should be administered as soon as practicable without undue delay. However, statutory time requirements do exist for some implied consent offenses.

B. NON-IMPLIED CONSENT TESTS

1. A non-implied consent test is any breath test on a SLED certified instrument not performed under the authority of the implied consent laws of South Carolina.
2. After a high reading on an implied consent test, the operator may perform a non-implied consent test if he/she is concerned about the subject's health. A high reading is defined as any significant reading that gives the operator concern regarding the subject's welfare. This reading is typically 0.35% alcohol concentration or greater. The results of this second test should not be used for court purposes. The operator does not have to wait to perform a second test before seeking medical attention for a subject.
3. To perform a non-implied consent test, the operator will activate the appropriate icon on the DataMaster DMT touch-screen labeled as "Non-Implied Consent."
4. During a non-implied consent test, only minimal test questions will be prompted. The operational protocol may be the same as in an implied consent test. If a non-implied consent test is performed,

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the instrument will denote this type of test on the Breath Alcohol Analysis Test Report/Evidence Ticket.

C. BREATH TEST SEQUENCE

1. The breath test sequence for an implied consent test encompasses the following events: video recording of the breath test (if applicable), advisement process (Implied Consent Rights, if applicable), checking of the mouth, data entry, observation period, operational protocol, and printout of the Breath Alcohol Analysis Test Report/Evidence Ticket. (The DataMaster DMT performs the start of the observation period/time-stamp function automatically; therefore, the operator no longer manually activates this function.) To ensure a proper test is administered, a test is considered complete only after the operational protocol has finished and the signature lines are printed on the Breath Alcohol Analysis Test Report/Evidence Ticket. (For a non-implied consent test, video recording of the breath test, advisement process, checking of the mouth, and observation period are not required. However, to ensure an accurate test, checking of the mouth and the observation period are recommended.) If a subject refuses at any time prior to or during the observation period, a simulator test does not need to be performed to ensure the instrument is in proper working order at the time of the test. (State v. Jansen, 305 S.C. 320, 408 S.E.2d 235 1991.) In this event, the operational protocol will be considered complete once the officer answers, "Yes," to the question, "Subject Refused?" In the event of a refusal, no further steps in the operational protocol need to be completed in order for the test to be defined as a completed test.
2. If a statute requires a video recording of the breath test, the test operator will activate the video recording equipment, advise the subject they are being video recorded, and inform the subject verbally and in writing of their Implied Consent Rights. If a video recording is not required, the operator is only required to inform the subject verbally and in writing of their Implied Consent Rights.
3. It is recommended, but not required, that the advisement process occur before checking of the mouth and the start of the observation period, however, it is a requirement that the subject be advised of his/her applicable Implied Consent Rights prior to providing a breath sample. A typical order of events would be advisement process, checking of the mouth, and start of the observation period.
4. Checking of the mouth will occur before the start of the observation period. The observation period is initiated at the point the operator answers the question, "Subject's Mouth Checked?" (The time the observation period begins is electronically stored by the DMT.) This question should be answered with a "Yes" only after the operator has checked the mouth for any foreign material and/or removable dental work. However, if the observation period is initiated before checking of the mouth, the operator will abort/cancel the test and begin a new breath test sequence.

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

THOMAS FORD, III,
Appellant,

Civil Action No.: 2017-CP-27-00440
Magistrate Case No. 5102P0677271

v.

REPLY BRIEF

CITY OF HARDEEVILLE,
Respondent.

Now comes Respondent, City of Hardeeville (hereinafter referred to as “Hardeeville” or “Respondent” interchangeably), by and through undersigned counsel pursuant to SC Code of Laws Ann. Sec. 18-3-40, in this Brief of Respondent responds to the Appellant’s Response to the Trial Court’s Return and respectfully requests the Court dismiss the appeal or in the alternative affirm the Appellant’s conviction.

FACTUAL BACKGROUND

On June 11, 2016 Off. Dewese of the Hardeeville Police Department arrested Appellant, Thomas Ford, III, (hereinafter referred to as “Defendant”, “Appellant”, and “Ford” interchangeably) for Driving Under the Influence (“DUI”). The Hardeeville Municipal Court found Appellant guilty of DUI. Appellant argues two discrete grounds for appeal: 1) The videos from the scene and breath test site do not conform with the mandatory provisions of S.C. Code Ann. § 56-5-2953 and 2) The Affidavit for Failure to Produce a Breath Site Video Recording signed and produced by the arresting officer is insufficient and does not meet the requirements of S.C. Code Ann. § 56-5-2953(B). For the reasons set forth below, the trial court’s denial of Ford’s motions should be affirmed.

ARGUMENT

- I. **Because the Trial Court did not err in finding the Appellant refused the State administered breath test, the arresting officer was not required to comply with the breath test site video recording requirements of S.C. Code Ann. § 56-5-2953(A)(2).**

The State is not required to comply with the breath site video requirements of S.C. Code Ann. § 56-5-2953 where the person refuses the test. State v. Elwell, 403 S.C. 606, 743 S.E.2d 802 (2011). The language of the breath site video taping requirements are unchanged since the *Elwell* decision and the instant arrest of Appellant in 2016. S.C. Code of Laws Ann. § 56-5-2953(A)(2) states that the recording at the breath test site must: (a) include the entire breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test; (b) include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test; and (c) also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video record this waiting period.

“The word ‘pre-test’ plainly requires a breath test be administered for the videotape requirement to apply, and if there is no test, the statute does not require a videotape.” State v. Hercheck, 403 S.C. 597, 603, 743 S.E.2d 798, 801 (2013). Here, as Ford concedes, there is no test and therefore no requirement to record the 20-minute pre-test observation. Otherwise, the legislature would not have included the “pre-test” modifier in the statute. *See, e.g., Breeden v. TCW, Inc./Tennessee Exp.*, 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003) (stating “[e]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction.”

While a driver may appear or allege after the fact to be indecisive at the time he or she must blow into a breath test device upon completion of the 20-minute wait period, it is impossible to distinguish between when someone is indecisive the refuses and when someone never intended and then refuses to provide a breath sample. The Appellant asks the Court to distinguish between a “clear refusal” and presumably a “not so clear refusal” to apply *Elwell* and *Hercheck*.

The trial Court found in Paragraph 1 of the Return that there was not a sufficient basis to find any noncompliance as grounds for dismissal. While a body camera may not be a SLED approved recording device for recording a breath test site, the trial court correctly references the plain language of S.C. Code of Laws Ann. § 56-5-2953(B) which states that the trial court can consider “any other valid reason for failure to produce the video recording based upon the totality of the circumstances.” In the instant case, Paragraph 10 the trial court clearly found a valid reason to not dismiss the case for recording a refused breath test with a body worn camera because the “officer discovered that both cameras were inoperable and activated his body camera to record the 20-minute observation period of his action ... [and] implied consent rights were advised.”

Even assuming there is non-compliance of the breath test statute requirements of S.C. Code of Laws Ann. § 56-5-2953(A)(2), the remedy would be suppression of a refusal as there was no breath test. Ford did not move for a suppression, which would have been error to suppress, but regardless he waived that remedy by not moving for the same.

The affidavit produced by the arresting officer states that he cannot “produce a video recording of the person’s conduct during the 20-minute pre-test waiting period[.]” The affidavit is not a binding admission of non-compliance with 2953’s breath site requirements. It is merely a tautology that the officer cannot produce a video of a “pre-test” 20-minute observation period where no test in fact occurs. See State v. Hercheck, 403 S.C. 597, 603, 743 S.E.2d 798, 801 (2013).

In other words, the officer is stating under oath that he cannot produce a video of something which in fact does not exist, that being a pre-test period with no test.

II. Because the trial court found that the State complied with the breath test video recording requirements of S.C. of Laws Ann. § 56-5-2953(A)(2), the Court should affirm Appellant's conviction.

The arresting officer activated his body camera to record the breath test room upon discovering the cameras in place were inoperable. (Par. 10 of Return). Nothing in the record supports Defendant's position that the body camera footage from the breath testing room omits the actions of the breath test operator, because there was no breath test performed. Again, the State is not required to produce video of the operator's actions in conducting the test when there is no test to record. *See State v. Elwell*, 403 S.C. 606, 743 S.E.2d 802 (2011).

The record and the exceptions on appeal fail to allege the body camera video produced of the breath test room does not include "the person being informed that he is being video recorded, and that he has the right to refuse the test[.]" S.C. Code of Laws Ann. § 56-5-2953(A)(2)(a). Additionally, the Appellant fails to show in the record that the video produced does not record Ford "refusing the breath test[.]" S.C. Code of Laws Ann. § 56-5-2953(A)(2)(b). Assuming Appellant has alleged non-compliance with these specific provisions of the breath test video taping statute, any portion of the video briefly omits the subject and still captures the audio portions which is the purpose of those specific provisions of S.C. Code of Laws Ann. § 56-5-2953(A)(2) which is to ensure a person charged with DUI understands his right to refuse. Ford refused the test by not communicating any form of agreement to take the test when prompted by the officer. Regardless, the video tape is not required where there is no test. *State v. Hercheck*, 403 S.C. 597, 603, 743 S.E.2d 798, 801 (2013)

III. Because the incident site video complies with complies with the incident site video recording requirements of S.C. of Laws Ann. § 56-5-2953(A)(1), the trial

court did not err and properly concluded that any non-compliance by asking “what time is it” was based on the totality of circumstances not grounds for dismissal per S.C. of Laws Ann. § 56-5-2953(B).

The trial court cannot dismiss a charge for driving under the influence (DUI) on the basis that statutorily-required video recording of incident site briefly omitted defendant from view was erroneous, where video began recording upon activation of blue lights, continuously recorded the entire time, and captured all field sobriety tests administered, defendant's arrest, and officer advising defendant of her *Miranda* rights, and omission did not occur during any events that either created direct evidence of a DUI or served defendant's important rights. State v. Taylor, 411 S.C. 294, 768 S.E.2d 71 (S.C. App. 2014). Another officer, Sgt. Brown, who was not the arresting officer, can be heard asking Ford who was inside his vehicle at the incident site “what time is it without looking at your watch.” The inquiry about what time is it without looking at his watch is an audible inquiry that can plainly be observed by listening. Since that portion was captured and recorded, the brief visual omission is immaterial.

An officer's recording of sobriety tests such as the Horizontal Gaze Nystagmus (HGN) field sobriety test is only required to show defendant's conduct generally, given that statute required a video recording of any field sobriety tests at the incident site. State v. Gordon, 414 S.C. 94, 777, S.E.2d 376 (2015). In Gordon, the Supreme Court found that the head is the subject of the test and should be recorded but not the eyes themselves which are observed during HGN. Id. Any visual omission of Ford during this alleged field sobriety test is immaterial similar to not being able to view a person's eyes during administration of the Horizontal Gaze Nystagmus test.

Any lack of video pertaining to visually depicting Ford during the time Sgt. Brown inquired about the time of day with Ford was extremely brief and a visual display was not significant. Moreover, the trial court correctly applied the provisions of S.C. Code Ann. § 56-5-

2953(B) which states that dismissal is not appropriate where as here there is valid reason for the failure to produce the portion “based upon the totality of the circumstances.” Here, in the totality of the circumstances, the audio recording is the pertinent inquiry and the in car video would not be able to show whether the driver had a watch or looked at his watch.

The most important aspect of any field sobriety test offered is whether the pertinent conduct is recorded. In Murphy v. State, the incident site video did not capture a full length image of the individual as she attempted field sobriety tests. Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). Murphy held that the video adequately reflected the individual's behavior. Here, defendant's conduct is recorded. The audible inquiry by Sgt. Brown is recorded as Ford sits inside his vehicle. There is no evidence in the record that any visual aspect to this test would be pertinent. As Ford correctly states, the inquiry is not a standard field sobriety test. The question and the answer are the material aspects to the inquiry for the investigation and the conduct is the driver's answer itself.

Lastly, there is nothing in the record establishing that Sgt. Brown's inquiry about the time is a “field sobriety test” any more than inquiring with someone about where they've been drinking or whether they feel safe to drive. This type of routine questioning is not a sobriety test or at least the record is devoid of any facts establishing this as a field sobriety test and therefore it is no recording required whatsoever by S.C. Code of Laws Ann. § 56-5-2953(A)(1).

CONCLUSION

For the reasons set forth above, the Court should affirm the Defendant's conviction.

Respectfully submitted August 24, 2018,

By s/ Prina C Maines
Prina C Maines
SC Bar No. 77947
Attorney for the Respondent

Thomas Ford III

Town of Hardeeville

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant
	or	
	<input type="checkbox"/> Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

This appeal is respectfully denied.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Jasper Common Pleas

Case Caption: Thomas Ford III VS Town Of Hardeeville

Case Number: 2017CP2700440

Type: Order/Form 4

So Ordered

s/Carmen T Mullen 2142



UNIFORM TRAFFIC TICKETS TO BE USED

This is a true and certified copy of the original document held in this Hardeeville Municipal Court

[Signature]
Clerk of Court
Date 6/30/16

ENFORCEMENT RECORDS COPY

Form S-438 Rev. 06/2014

UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA
VERSUS

FIRST NAME THOMAS		MIDDLE NAME JEFFERS		LAST NAME FORD	
CITY CONWAY		STATE SC		ZIP CODE 29526-8420	
DL STATE SC	DRIVERS LICENSE NO.	CLASS D	CDL <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	HAIR BRO	EYES HAZ
RACE W	SEX M	BIRTH DATE	WGT. 137	HAZ HAZ	COMM. VEH. OTHER
VEH. LIC. NO.	STATE SC	MAKE OF VEH. GMC	YEAR 1998	IS PSORVEN HAZ MT	HAZ MT
VEHICLE OWNER FIRST NAME GLORIA FORD		MIDDLE NAME		LAST NAME	
OWNER STREET		CITY CONWAY		STATE SC	
		ZIP CODE 29526-8420			
YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT					
NAME OF TRIAL COURT HARDEEVILLE MUNICIPAL					
DATE OF TRIAL 06/30/2016		CITY HARDEEVILLE, SC		STATE SC	
VIOLATION SECTION NO. 56-05-2930(A) / 3353		VIOLATION - COURT APPEARANCE REQUIRED DRIVING UNDER THE INFLUENCE		YES NO	
DATE OF VIOLATION 06/11/2016		TIME OF VIOLATION 0245		B.A. LEVEL	
VIOLATION LOCATION I-95 SB MM 5		COUNTY JASPER		CITY HARDEEVILLE	
NAME AND RANK OF ARRESTING OFFICER PFC B DEWEESE		SCCJA OFFICER NUMBER 4717-0757			
BAIL DEPOSITED JAIL		DATE OF ARREST 06/11/2016		BOND AMOUNT REQUESTED 992.00	
DATE BAIL REC'D		BY			
CASE BEFORE MAGISTRATE		MUN. COURT		CIRCUIT COURT	
		<input type="checkbox"/>		<input type="checkbox"/>	
NAME OF THE TRIAL COURT IF DIFFERENT FROM ABOVE:					
TRIAL BY:		TRIAL JUDGE		DEFENDANT: DID NOT APPEAR	
				<input type="checkbox"/> APPEARED	
DISPOSITION DATE 06/30/2016		DISPOSITION NOLLE PROSSO FORFEITED BOND		PLED: NOLLE CONTENDERE	
		<input type="checkbox"/> GUILTY <input type="checkbox"/> NOT GUILTY		<input type="checkbox"/>	
CHARGE CONVICTED OF					
SAME AS ORIGINAL					
JAIL		SUSPEND		FINE	
				AMT. COLLECTED	
				AMT. SUSPENDED	
				COMMITTED TO:	
CERTIFIED CORRECT		DATE		Vehicle Searched NO	
				Arrest as Result of Condon YES	
ENFORCEMENT RECORDS COPY TICKET# 20161170000854					

CITY/COUNTY OF: HARDEEVILLE
INCIDENT NO: 16-00732
AGENCY/TROOP: HARDEEVILLE POLICE DEPARTMENT

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

May 8, 2020



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